Office-Supreme Court, U.S.
FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-116

In the Supreme Court of the United States

OCTOBER TERM, 1980

CRAIG E. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

STEPHEN M. ORR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The question presented by the petition in these cases is whether the courts below properly held that enforcement of internal revenue summonses calling for production of business and financial records and workpapers of petitioners' client did not violate the client's Fifth Amendment or attorney-client privileges.

The pertinent facts may be summarized as follows: Petitioners, members, of the same law firm, were each summoned to give testimony and produce business records in

their possession necessary to determine the correct tax liabilities of Robert M. Howard, a taxpayer under investigation. Petitioner Orr had represented Howard in several criminal proceedings and in various business transactions. Petitioner Davis, a certified public accountant as well as an attorney, had prepared Howard's federal income tax returns for several years (Pet. App. 5a-7a). The summons issued to Davis required him to produce all records of financial transactions by Howard or corporations controlled by him, and the workpapers from which the income tax returns were prepared. The summons to Orr called for 14 classes of business or financial records. Each petitioner refused to comply with the summons he received and enforcement proceedings were instituted in the United States District Court for the Western District of Texas to compel compliance with these summonses (*ibid.*).

In each case, the district court held that the government had made the requisite showing to establish a prima facie case for enforcement by meeting the requirements set forth in *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), and that the summoned party had neither refuted the government's case nor established any procedural defense to the summons. On the authority of *Fisher* v. *United States*, 425 U.S. 391 (1976), the district court further concluded that the business and financial records and workpapers summoned were not testimonial communications by the taxpayer which would have been protected by his privilege against self-incrimination if in his hands, and thus were not protected by the attorney-client privilege in the hands of the attorney (Pet. App. 15a).

The court of appeals affirmed the order enforcing the summons to Davis in its entirety, and affirmed the order to

Orr except as to three classes of items.[1] It held that the district court had followed the correct procedures and that petitioners had failed to sustain their burden of proving their defenses (Pet. App. 9a-13a). Finding that petitioner Davis was preparing tax returns, instead of giving legal advice, the court concluded that the documents received by petitioner Davis, along with the workpapers generated by him, were not protected by the attorney-client privilege (Pet. App. 18a-19a). The court also determined that the documents summoned from Orr (with the exceptions noted below—note 1) related to matters other than the giving of legal advice and thus fell outside the attorney-client privilege. Those items included records of financial trasactions made for taxpayer by Orr. The court further held that reports and tax returns filed with the government could not be privileged in any event (Pet. App. 19a).

1. Petitioner Davis asserts (Pet. 5-10) that the courts below erred in holding that the attorney-client privilege does not protect workpapers created by him and documents received by him for the sole purpose of preparing income tax returns for the taxpayer. The privilege, however, protects from disclosure only confidential communications made to a lawyer acting in the capacity of a lawyer. Here, the courts below concluded that Davis was not acting in that capacity in preparing the tax returns for Howard. This factual determination does not warrant further review by this Court. Indeed, it is consistent with similar holdings of other courts of appeals. See *Canaday* v. *United States*, 354 F. 2d 849, 857 (8th Cir. 1966); *Olender* v. *United States*,

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[1]The government conceded that Howard's will which had been summoned from Orr, was protected by the privilege (Pet. App. 19a). The court of appeals also reversed as to two classes of items summoned from Orr, and remanded for further proceedings to determine whether records of business operations and financial summaries were protected under *Fisher* (Pet. App. 20a).

210 F. 2d 795, 805-806 (9th Cir. 1954). Moreover, as the court of appeals noted (Pet. App. 19a, n.18), petitioner Davis' client provided him with the information in question in order that it be disclosed on his tax return. Accordingly the information was not a confidential communication to Davis in any event.

Colton v. *United States*, 306 F. 2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), upon which petitioners rely (Pet. 6, 8-9), is not to the contrary. In *Colton*, the court of appeals assumed (306 F. 2d at 637) that the preparation of tax returns was sufficiently related to giving legal advice to bring confidential communications made and received in order to prepare the returns within the scope of the privilege. The court, however, went on to hold that materials similar to those sought here, such as workpapers and data necessary to prepare the return, cannot be confidential communications because the information they contain was intended to be disclosed in the tax return. That holding was approved by the court of appeals below (Pet. App. 19a n.18) and is consistent with *United States* v. *Cote*, 456 F. 2d 142, 144-145 (8th Cir. 1972). Thus, there is no conflict between the decision below and *Colton* which bears on the ultimate resolution in this case.

2. Petitioner Orr claims (Pet. 16-17) that he has a right to raise his client's Fifth Amendment privilege against self-incrimination to bar production of documents in Orr's hands which might incriminate his client. But this Court rejected that very contention in *Fisher* v. *United States*, *supra*, 425 U.S. at 402-403, holding that "compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself." Similarly, his assertion (Pet. 17) that "[t]he question of a lawyer's right to refuse to produce documents or testimony which might incriminate a client should be resolved"

ignores several decisions of the Court holding that the Fifth Amendment does not protect incriminating information obtained from sources other than the accused. See *Fisher* v. *United States, supra,* 425 U.S. at 397; *Couch* v. *United States,* 409 U.S. 322, 328 (1973); *Johnson* v. *United States,* 228 U.S. 457, 458 (1913).[2]

3. Finally, petitioners contend (Pet. 17-18) that the court of appeals erred in ruling that the government can meet its burden under *United States* v. *Powell, supra,* by an affidavit from the agent who issued the summons. In addition, petitioner Orr asserts (Pet. 18-19) that the courts below erred in refusing to permit him prehearing discovery. However, the rulings on these procedural points are consistent with the uniform holdings of other courts of appeals that the government establishes a prima facie case for enforcement of a summons by the affidavit of the agent who issued the summons alleging the *Powell* requirements have been met and that permitting the summoned party to cross-examine the agent at the enforcement hearing is an acceptable substitute for prehearing discovery. *United States* v. *Stuckey,* 646 F. 2d 1369, 1374 (9th Cir. 1981); *United States* v. *Moon,* 616 F. 2d 1043, 1046-1047 (8th Cir. 1980); *United States* v. *Freedom Church,* 613 F. 2d 316, 321, 323 (1st Cir. 1979); *United States* v. *Garden State National Bank,* 607 F. 2d 61, 68-70 (3d Cir. 1979); *United States* v. *Moll,* 602

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[2]Nor does the decision below conflict with *In re Michaelson,* 511 F. 2d 882 (9th Cir.), cert. denied, 421 U.S. 978 (1975) (Pet. 16). In *Michaelson,* the court, on the authority of *Couch* v. *United States, supra,* 409 U.S. at 328, rejected an attorney's attempts to raise the client's Fifth Amendment privilege. In so ruling, the court noted that no valid claim of Fifth Amendment privilege could have been made in any event because the client in that case had been granted immunity (511 F. 2d at 889-890).

F. 2d 134, 139 (7th Cir. 1979); *United States* v. *Morgan Guaranty Trust Co.*, 572 F. 2d 36, 42 (2d Cir.), cert. denied, 439 U.S. 822 (1978).[3]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

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[3]Petitioners also ask (Pet. 10, 16) that certiorari be granted solely as a means to obtain a remand to the district court for resolution of factual issues regarding the existence, possession or control of individual documents. This request is predicated on petitioners' disagreement with the factual determinations of the courts below (Pet. 11-15) and is thus inappropriate for certiorari. At all events, petitioners may obtain the relief they seek in further proceedings in the district court either by way of contempt for refusing to produce specific documents (see *In re September 1975 Grand Jury Term*, 532 F. 2d 734, 736 (10th Cir. 1976)), or by seeking an in camera ruling from the district court in a supplementary proceeding. See *Brown* v. *United States*, 276 U.S. 134 (1928); *United States* v. *Cote*, *supra*, 456 F. 2d at 145 n.4; *Colton* v. *United States*, *supra*, 306 F. 2d at 638-639.

DOJ-1981-08